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## **PRESS RELEASE 05/2007**

### **Judgment in Case E-2/06 *EFTA Surveillance Authority v The Kingdom of Norway***

#### **Conditions for acquiring rights to waterfalls for energy production incompatible with the EEA Agreement.**

In a judgment delivered today, the EFTA Court declared that the Kingdom of Norway has failed to fulfil its obligations pursuant to the EEA Agreement.

The case was brought before the Court by the EFTA Surveillance Authority (ESA) against the Kingdom of Norway. It concerned provisions of the Norwegian Industrial Licensing Act (lov 14. desember 1917 nr. 16 om erverv av vannfall, bergverk og annen fast eiendom m.v.) which provide that undertakings that are defined as “public undertakings” pursuant to the Act are granted concessions for acquisition of waterfalls for energy production without time limitation whereas others, including all foreign undertakings, are granted time-limited concessions. Moreover, all private and foreign undertakings are subject to the requirement that property rights to waterfalls and related installations, such as all the facilities through which the course and bed of the water have been altered, the power plant and appurtenant machinery, shall revert to the State with full ownership rights and without compensation at the end of the concession period (system of reversion).

Under Norwegian Law, river systems have from the very beginning been subject to private ownership. Rules on concessions for acquisition of waterfalls for energy production, including rules on reversion, were first introduced in the early 20<sup>th</sup> century. At that time, most waterfalls were in private ownership and the country was experiencing rapid increase in foreign investment in waterfalls for energy production. The rules were adopted as a reaction to this development. Presently, approximately 88% of the total hydropower production capacity is in public ownership.

The dispute of the case essentially concerned the interpretation of Article 125 EEA which states that the EEA Agreement “shall in no way prejudice the rules of the Contracting Parties governing the system of property ownership”. In that regard, the parties to the case disagreed on whether the contested rules fall under the scope of the EEA Agreement and, if so, whether the differentiation entailed in the rules is in conformity with Article 31 EEA on the freedom of establishment and Article 40 EEA on the free movement of capital.

The Court found that Article 125 EEA is to be interpreted to the effect that, although the system of property ownership is a matter for each EEA State to decide, the said provision does not have the effect of exempting measures establishing such a system from the fundamental rules of the EEA Agreement, including the rules on free movement of capital and freedom of establishment.

The Court held that the differentiation entailed in the contested rules, has a negative effect on the value of the investment of private and foreign investors in hydropower production, due to the fact that they have a shorter time to get a return on their

investment than Norwegian public undertakings. This differentiation constituted indirect discrimination against foreign operators restricting both free movement of capital and freedom of establishment.

The Court interpreted Article 125 EEA to the effect that an EEA State's right to decide whether hydropower resources and related installations are in private or public ownership is, as such, not affected by the EEA Agreement. Therefore, Norway may legitimately pursue the objective of establishing a system of public ownership over these assets. However, the Court rejected that the Norwegian regime aims at establishing a system of property ownership under Article 125 EEA, since it merely brings or keeps hydropower resources and related installations predominantly within public ownership, while at the same time leaving it to the discretion of the relevant authorities whether private ownership of the assets should be re-established. In this regard, the Court referred inter alia to provisions of the Industrial Licensing Act which provide that private undertakings may obtain a concession for acquiring new hydropower resources and provisions which allow authorities to resell reverted rights to private undertakings. The Court held that the Norwegian regime, as it exists today, aims at achieving a certain level of public control of the hydropower sector rather than achieving public ownership.

The Court found that although acquiring public control could not qualify as a mandatory requirement capable of justifying the restriction in question, public control is a means of achieving the legitimate objectives of public security in relation to security of energy supply and environmental concerns. However, the Government of Norway failed to demonstrate that ownership control is necessary in order to meet these aims, which can be achieved by other less restrictive but equally effective means.

The full text of the judgment may be found on the Internet at: [www.eftacourt.lu](http://www.eftacourt.lu)

This press release is not an official document. Please note that the Court may not comment on the case.